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No. 79-816

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

POTOMAC ELECTRIC POWER COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

AND

TERRY M. CROSS, JR.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT TERRY M. CROSS, JR.

Petition for Certiorari Filed November 23, 1979
Certiorari Granted February 19, 1980

QUESTION PRESENTED FOR REVIEW

Whether an employee covered by the provisions of the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 901, *et seq.*, who suffers a permanent partial disability due to an injury to his knee, and such injury causes him to incur a loss of wage earning capacity

greater than the benefits he would receive under the "scheduled loss provisions" set forth in 33 U.S.C. §§ 908(c)(2), (19), is entitled to compensation based on that loss of wage earning capacity pursuant to 33 U.S.C. § 908(c)(21)?

OPINIONS DELIVERED BY THE COURTS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 196 U.S. App. D.C. 417, 606 F.2d 1324 (1979). The decision of the Benefits Review Board of the Department of Labor is reported at 7 B.R.B.S. 10. The opinion and order of the Administrative Law Judge of the Office of Workers' Compensation is not reported.

STATEMENT OF THE CASE

On December 7, 1974, while working in a manhole, Terry M. Cross, Jr. ("Cross") sustained an accidental injury to his left knee. Cross, an employee of the Potomac Electric Power Company ("PEPCO") since 1961, had been working as a Class A Cable Splicer for more than two years. The December 7, 1974 injury resulted in a torn medical meniscus which required surgery to remove the cartilage. (J.A. 46(a)-47(a)).

After Cross' surgery, he was placed on a light duty status by PEPCO's doctors and, while he retained the job classification of a Class A Cable Splicer, he was and is unable to perform the rugged, demanding, and strenuous work which that position requires. For that reason, PEPCO denied Cross pay raises and Cross has been unable to work overtime, thereby losing considerable income. (J.A. 46(a)-47(a)). According to the unchallenged finding of the Administrative Law Judge below, Cross

has incurred a lost wage earning capacity of $6,766.92 per year, or $130.10 per week, as a direct result of his on the job injury. (J.A. 49(a)).

PEPCO has taken the position that since Cross' injury was limited to his knee, any benefits to which he might be entitled would be limited to the formula established by 33 U.S.C. §§ 908(c)(2) and (19). Using the medical testimony presented at the hearing, Cross suffered somewhere between a 5 percent and a 20 percent loss of the use of his left leg. Therefore, his total compensation would be limited to an amount between $3,191.97 and $12,773.38 (Brief of Petitioner at 9). In light of the findings of the Administrative Law Judge that Cross has suffered a wage earning loss equal to $130.10 per week, PEPCO's proposal would compensate Cross for from as little as six months' lost wages to, at most, less than two years' lost wages.

The Administrative Law Judge rejected PEPCO's argument and found that Cross could receive his compensation under the provision of section 8(c)(21) of the Act, 33 U.S.C. § 908(c)(21), based on his loss of wage earning capacity. His decision recognized that while the scheduled loss provisions found in section 8(c)(1)-(20), 33 U.S.C. §§ 308(c)(1)-(20), provided a minimum level of compensation for employees who suffered anatomical injuries, they did not bar an employee from receiving compensation based on his lost wage earning capacity. (J.A. 47(a)-50(a).) That decision was affirmed by the Benefits Review Board and by a divided panel of the United States Court of Appeals for the District of Columbia Circuit.

SUMMARY OF ARGUMENT

Section 8(c) of the Act provides for the payment of benefits for employees who suffer permanent partial disabilities. That section provides for two basic methods of compensation of benefits for such disabilities: (1) payment of two-thirds of a specified number of weeks' wages as set forth in the statute and tied to certain injuries (§§ 8(c)(1)-(20)), and (2) compensation based on two-thirds of the loss of earning capacity that the employee suffers as a result of his injury (§ 8(c)(21)). The case law and legislative history reflect that the first method, referred to as the scheduled loss benefits, was designed to compensate employees for the permanent physical loss which they incurred regardless of whether the injury caused any permanent economic loss. The second method of compensation, known as the "other cases" provision, compensates employees who incur a "disability," as a result of his injury. Since the economic loss suffered by Cross constitutes a disability under section 2(10) of the Act, he is entitled to elect to receive his compensation under section 8(c)(21) and to receive compensation for his loss of wage earning capacity.

The Petitioner's argument that the scheduled benefits provisions are mandatory for an employee who suffers an injury to a portion of his anatomy which is contained in the scheduled loss provisions and therefore bar an employee with a disproportionate wage earning loss from receiving compensation for that loss misreads and misinterprets both the Act and Congress' motivation for inserting the scheduled benefits provision. Congress designed the scheduled benefits to create a minimum benefit for an employee who suffers an anatomical loss due to a job related injury. Those provisions were never

intended to supplant the basic concept that disability must be viewed by its economic effect on the worker; rather, the schedules were added to supplement and expand that view. The Petitioner desires to interpret and apply a humanitarian and supplemental benefit program in such a way as to leave Respondent Cross grossly undercompensated for that very economic loss that Congress intended to compensate. Neither the statute, Congressional history nor the case law support such a view.

ARGUMENT

I.

THE PURPOSES OF THE ACT

The Longshoremen's and Harborworkers' Compensation Act [hereinafter referred to as the "Act"], 33 U.S.C. § 901, *et seq.*, (1976)[1] is designed to provide injured employees compensation for the losses they might suffer as a result of industrial or "on the job" injuries. As this Court noted in *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414 (1932):

> The measure before us * * * requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work whether with or without fault attributable to employers. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were

[1] The Act is made applicable to employees within the District of Columbia by D.C. Code § 36-501 (1973).

enacted and, if possible, so as to avoid incongruous or harsh results. * * *

To this end, the primary focus of the Act has been to tie the concept of disability to the economic loss which accompanies an injury. The basic purpose of the Act is not to compensate an employee for his pain or the fact of his injury; rather it is designed to restore to him some of the wages and the medical expenses which the injury would otherwise require him to incur. Section 2(10)[2] defines "disability" as the "incapacity because of an injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment." Accordingly, it has been uniformly held that disability is an economic concept and not a medical concept. *American Mutual Insurance Company of Boston v. Jones*, 138 U.S. App. D.C. 269, 271, 426 F.2d 1263, 1265 (1970); *Haughton Elevator Company v. Lewis*, 572 F.2d 447 (4th Cir. 1978).

In interpreting the Act, this Court has required that it be construed liberally so as to accomplish its purposes and to avoid harsh results. *Baltimore & Philadelphia Co. v. Norton, supra; Voris v. Eikel*, 346 U.S. 328, 333 (1953). In order to read the statute in the manner proposed by PEPCO, this Court would have to ignore the basic purpose of the Act and thereby leave Cross grossly undercompensated for his economic loss.

[2] 33 U.S.C. § 902 (10) (1976).

II.

STATUTORY SCHEME

A. All Categories Of Disability Are Intended To Compensate The Employee For His Loss Of Wage Earning Capacity.

Under section 8 of the Act,[3] an injured employee may be eligible for compensation under four different categories of disability. Section 8(a) provides for compensation in the event of permanent total disability. The measure of compensation is based on 66-2/3 percentum of the employee's weekly wage during the length of the disability. Section 8(b) provides for compensation due to temporary total disability and, again, the measure of compensation is based on 66-2/3 percentum of the employee's weekly wages during the length of the disability. Compensation for temporary partial disability is provided in section 8(e) which, also, calculates the benefit based on two-thirds of the difference between the employee's average weekly wages before the injury and his earning capacity after the injury for the length of the disability, not to exceed five years.

The final category of disability is found in section 8(c) and is the provision at issue. Section 8(c) provides for compensation to an employee who has suffered a permanent partial disability. However, that section establishes two different formulas for the calculation of benefits. Subsection (c)(21), the so-called "other cases" provision, provides for benefits in the same manner as is provided in the other forms of disability, i.e., compensation based on two-thirds of the loss of earning capacity

[3] 33 U.S.C. § 908, (1976).

suffered by the employee as a result of the injury. Section 8(c) also provides for compensation for specially listed injuries calculated on the basis of a specified number of weeks' wages for each listed injury. For instance, section 8(c)(2) reads, "leg lost, two hundred and forty-four weeks' compensation." Finally, section 8(c)(19) provides that for a partial loss of one of the anatomical members set forth in subsections (c)(1)-(17), the employee may receive compensation under the schedule proportionate to the degree of impairment.

The scheduled loss provisions set forth in section 8(c)(1)-(20) are the only provisions in the Act which deviate from the general concept that compensation should be based on lost earning capacity and from the specific definition of disability contained in section 2(10), which explicitly ties the concept of disability to the economic effect of the injury.

This special system of benefits through the scheduled loss provisions is based on a recognition that often an employee may lose all or part of an anatomical member but would have no economic loss beyond that compensated under the temporary disability provisions. The scheduled loss provisions provide an injured employee who has suffered the loss of a member a minimum compensation benefit, based not on the economic effect of the loss, but on the physical loss itself. Neither the statutory scheme, the intent of Congress, nor the existing case law support PEPCO's contention that the scheduled loss provisions were intended to penalize or limit the compensation of an employee who suffers a loss of wage earning capacity greatly disproportionate to the limited scheduled benefits.

B. The Legislative History Reflects Congress' Desire To Provide A Floor Of Compensation For Anatomical Losses, Not A Ceiling.

The Longshoremen's and Harborworkers' Compensation Act was originally enacted in 1927. Act of March 4, 1927, Pub. L. No. 803, Ch. 509, 44 Stat. 1427 (current version at 33 U.S.C. § 901 *et. seq.* (1976)). At that time, the Act established the basic provisions for compensation, including section 8(c). Those provisions have remained basically unchanged since 1927.

The legislative history as to Congress' motivation in deviating from the concept of loss of wage earning capacity when it established the scheduled loss provisions is unclear at best. However, the circumstances surrounding the insertion of the scheduled loss provisions reflect that Congress intended to create a benefit floor rather than limit the employee's right to compensation for his economic loss.

In 1926, the Senate considered and adopted S. 3170. That bill as reported by the Committee treated permanent partial disability in the same manner as it treated all other classes of disability. It provided that the compensation benefit provisions of the Federal Employees' Compensation Act, Act of September 7, 1916, Pub. L. No. 267, Ch. 258, 39 Stat. 743, 5 U.S.C. § 750 *et seq.* (1926 Ed.), would be applied to employees covered by the Act. Those provisions provided an employee with a permanent partial disability two-thirds of the difference between his pre-injury income and his post-injury wage earning capacity. In effect, all employees with permanent partial disabilities would receive benefits in the same manner as is currently contained in section 8(c)(21). S. Rep. No. 973, 69th Cong., 1st Sess. 2-3 (1926); 67

CONG. REC. 10614 (1926) (Remarks of Sen. Walsh). The flaw in this approach was that it failed to provide compensation to an employee who suffered loss to an anatomical member if that loss was not accompanied by a decrease in earning capacity.

When the House considered S. 3170, it amended the benefit provisions to insert a minimum schedule of benefits for the employee who suffers such an anatomical loss but does not suffer a loss of wage earning capacity. The House then retained the basic feature of the Senate version by adopting section 8(c)(21), which provides for compensation for loss of wage earning capacity in "all other cases". H.R. Rep. No. 1767, 69th Cong., 2d Sess. 4 (1927).

C. Subsequent Amendments

While the Act has been amended a number of times, as pointed out above, the basic compensation scheme has remained basically intact since 1927. There have been certain references to and discussions of section 8(c), however, which indicate that when Congress inserted the scheduled benefit provisions it merely attempted to insure that an employee who suffered an anatomical loss would receive some compensation for that loss, even if the loss did not affect his wage earning capacity.

1. *1938 Amendments*

In 1938, the Act was amended by H.R. 5690 which clarified the term "wage earning capacity." Longshoremen's and Harborworkers' Compensation Act Amendments of June 25, 1938, Ch. 685, § 2, 52 Stat. 1165. The purpose of the amendment was to eliminate needless litigation over the precise meaning of the term "loss

of earning capacity." The amendment was designed to allow the initial factfinder to consider a number of factors other than the employee's prior work history in determining his actual loss of wage earning capacity. H.R. Rep. No. 1945, 75th Cong., 3d Sess. 5-6 (1938).

2. *1948 Amendments*

While the 1948 amendments simply adjusted the number of weeks contained in the schedule, both the House and the Senate noted that the basic purpose for scheduled benefits was not to reflect loss of income, but to indemnify an employee for his physical loss:

> Such compensation [scheduled benefits] is in the nature of an indemnity to be paid to an employee who has suffered such an injury and has always been intended to be separate from and in addition to other compensation to which such employee may be entitled to by reason of a temporary total disability or temporary partial disability immediately following his injury.

H.R. Rep. No. 2095, 80th Cong., 2d Sess. 4 (1948). Similarly, the Senate report also referred to the scheduled loss provisions as an "indemnity." "The committee proposes the new indemnity rates as in the nature of a compensatory feature." S. Rep. No. 1315, 80th Cong., 2d Sess. 3 (1948).

3. *1956 Amendments*

Congress again amended the Act in 1956 to adjust the number of weeks in the schedule. The legislative history surrounding those amendments clearly reflects that the scheduled benefits were intended to establish minimum benefits for the fact of injury and not to preclude an

employee from being compensated for his greater loss of earning capacity. The House Committee on Education and Labor stated:

> Section 2 of the bill amends the schedule for compensation in section 8(c) of the Longshoremen's Act, applicable to cases where the disability consists of an anatomical loss, such as an eye, hand, leg, foot, etc. The bill restores the scheduled number of weeks' compensation for the specified disabilities to the same level as they existed in 1927 when the bill was first enacted. As thus restored they will be the same as those in the like schedule in the Federal Employees' Compensation Act. When amending the act in 1934 to remove the limit upon compensation payable for arbitrarily set healing periods (related by the statute to specific anatomical injuries), the then schedule in section 8(c) was reduced in each category by the arbitrary healing period applied.
>
> In thus reducing the scheduled period for anatomical injury, the monetary value of the loss was reduced by a factor which bore no relation to compensation for permanent partial disability. The committee believes this inequitable effect should be corrected by restoring the schedule to its original levels.

H.R. Rep. No. 2067, 84th Cong., 2d Sess. 4 (1956).

4. *1972 Amendments*

In 1972 it was proposed that section 8(c) be amended to add a provision which would allow an employee who suffers a loss of a member to receive benefits under the scheduled loss provisions (section 8(c)(1)-(19)), and, if he has also incurred a loss of earning capacity, to receive benefits based solely on that lost capacity at the expiration of the scheduled loss benefits. PEPCO attempts to present the rejection of that amendment as a Congressional rejection to the holding of the court below. Such a position is untenable. The Petitioner's argument ignores the fact that the amendment went far beyond anything suggested by either Respondents or the decisions below. The 1972 amendment would have created a dual cumulative system of benefits, first the employee would receive all of the scheduled loss benefits available under the statute (66-2/3 percentum of his average weekly wage for a specified number of weeks), and when those benefits are exhausted, he would then receive compensation based on his loss of earning capaicty (66-2/3 percentum of the difference between his pre-injury weekly wage and his post-injury earning capacity).

While this differential in Respondent Cross' case is not as dramatic as it might be in those cases where the percentage of the loss of use of the member would be significantly higher, the case at bar does reveal the fundamental distinction between Respondent's position and the proposed amendment. Under the current statute, as Respondents read it, Cross is entitled to $86.76 per week for the length of his disability.[4] However, under the proposed amendment, Cross would have been eligible to receive $221.65 per week for the first 57.6 weeks of permanent disability (after the expiration of any temporary benefits to which he might be entitled.)[5] Thus for approximately the first year and a month, under the proposed amendment, Cross would have received $7,769.66 more than he would receive under the current

[4] 66-2/3 percentum of his loss of wage earning capacity ($130.13) equals $86.76.

[5] 66-2/3 percentum of Cross' average weekly salary ($332.48) equals $221.66. That amount is then paid over 20 percent of 288 weeks (57.6 weeks).

decision. It is clear that the rejection of an additional benefit was not a Congressional rejection of a system of alternative benefits. Congress adopted the scheduled benefits in 1927, to insure than an employee who lost a member or who suffered disfigurement would receive some compensation for that loss even if he did not incur a loss of wage earning capacity. There is no indication that Congress ever intended to allow an employee to receive both indemnification for the physical loss and then compensation for the economic loss.

Despite PEPCO's extensive analysis of the testimony of witnesses before various committees (Brief of Petitioner at 14-23), nowhere does it cite any indication that Congress intended and believed that the scheduled benefits were exclusive and controlling over the benefits under section 8(c)(21). The comments of Representative Daniels (Brief of Petitioner at 15-6), the only Congressional statements on which Petitioner relies, clearly advocate the cumulative benefits the amendment would have provided, but do not indicate that under the current law the schedule bars the employee's reliance on alternate benefit provisions. Indeed, in light of the remedial purposes of the statute and the uninterrupted interpretation that disability is an economic concept, Congress' rejection of the 1972 amendment was wholly in keeping with the realization that the scheduled benefits were designed to indemnify an employee for the loss of a member but that they were not intended to foreclose him from receiving compensation for his greater real economic loss.

III.

THE CASE LAW SUPPORTS RESPONDENTS' POSITION

A. Cross Is Not Limited To Scheduled Benefits After He Establishes A Greater Loss In Wage Earning Capacity.

The primary concern and thrust of the inclusion of the scheduled benefits in section 8(c) were to insure that an employee who incurred the physical lost of a member (or the loss of the use of the member) without a concomitant economic loss would still receive some compensation for that loss. ". . . [I]n effect, the claimant is being compensated for the loss of the body member, not lost earning capacity." *Gulf Stevedore Corp. v. Hollins*, 298 F. Supp. 426, 431 (S.D. Tex. 1969), *aff'd* 477 F.2d 160 (5th Cir. 1970), *cert. denied* 400 U.S. 831 (1970).

It is now well established that the scheduled benefits were never intended to foreclose the employee from receiving higher benefits to which he may be entitled under other provisions of the Act. In *American Mutual Insurance Company of Boston v. Jones*, 138 U.S. App. D.C. 269, 426 F.2d 1263 (1970), the court held that an employee who suffered a physical injury which would be compensable under the scheduled benefit provisions was not barred from receiving permanent total disability benefits. The court recognized, "The degree of 'disability' in any case cannot be measured by physical condition alone, but there must be taken into consideration the injured man's age, his industrial history, and the availability of that type of work which he can do." *Id.*, 138 U.S. App. D.C. at 271. *Accord, Bath Iron Works Corp. v. White*, 584 F.2d 568, 574 (1st Cir. 1978); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447 (4th Cir. 1978);

Norfolk, Baltimore & Carolina Line, Inc. v. Bergenson, 351 F. Supp. 348 (D.S.C. 1972).

Similarly, the courts have recognized that where an injury to a scheduled member impairs the body as a whole, or some other nonscheduled portion of the body, the measure of the employee's benefits is either the scheduled loss or, if such benefit be insufficient to compensate him for his loss of wage earning capacity, two-thirds of that lost capacity. *Jaynes v. Industrial Commission*, 7 Ariz. App. 78 (1968); *Illinois Exploration v. Ashley*, 430 S.W. 2d 330 (Ky. 1968). As Professor Larson stated:

> Although it is difficult to speak in terms of a majority rule on this point, because of significant differences in statutory background, it can be said that at one time the doctrine of exclusiveness of schedule allowances did dominate the field. But in recent years there has developed such a strong trend in the opposite direction one might now, with equal justification, say that the field is dominated by the veiw that schedule allowances should not be deemed exclusive, whether the issue is treatment of a smaller member as a percentage loss of a larger, or treatment of any scheduled loss as a partial or total disability of the body as a whole.

2 Larson, *The Law of Workmen's Compensation*, § 58.20, pp. 10-212–10-214 (1974).

Following this trend, the Benefits Review Board of the Department of Labor[6] has focused on the effect an injury or loss has on the employee as a whole. This

[6]The Benefits Review Board replaced the United States District Court as the initial review tribunal pursuant to the Longshoremen's and Harborworkers' Compensation Act Amendments of 1972 § 15, Pub. L. No. 92-576, 86 Stat. 1251, 1261 (1972).

examination is based on the underlying premises that disability is an economic concept and not a medical concept (*American Mutual Insurance Company v. Jones, supra*) and that disability must be viewed, not merely in light of the nature of the injury to the member, but in light of the economic effect that injury has on the employee as a whole.

In *Mason v. Old Dominion Stevedoring Corporation*, 1 BRBS 257, BRB No. 74-182 (1975), the employee was a longshoreman who injured his left wrist in an on-the-job accident. While he was unable to return to work as a longshoreman as a result of his injury, he was not totally disabled under the Act. The employee had been able to scrape out a meager living as a watermelon and fish street vendor. Had he not applied himself and sought out some means of employemnt, it is clear that the schedudled injury would have had the economic effect of rendering the employee totally disabled under the *American Mutual Insurance Company of Boston v. Jones* doctrine. The Board found, in light of this Court's mandate that the Act be interpreted liberally and, if possible, so as to avoid incongruous or harsh results (*Voris v. Eikel*, 346 U.S. 328, 333 (1953)), and the recognition that disability must be measured in light of the claimant's age, education, industrial history and the availability of employment, that the employee suffered a permanent partial disability to his body as an economic functioning unit and was entitled to receive benefits under section 8(c)(21), based on his economic loss. As the Board noted, "To limit a claimant, who is unable to return to the duties of his former occupation, to compensation pursuant to a schedule under section 8(c) of the Act would have the effect of dissuading efforts on the part of

an injured claimant to rehabilitate himself." *Id.; Collins v. Todd Shipyards Corp.*, 9 BRBS 1015, 1021 (1979).

B. The Cases Relied Upon By Petitioner Are Inapposite.

It is extremely rare for an employee who suffers an injury to an anatomical member to seek compensation under section 8(c)(21). In the vast majority of the cases where such an injury occurs, the issues are either whether the employee is totally disabled, e.g., *American Insurance Company of Boston v. Jones, supra,* or whether the employee is entitled to compensation under the scheduled loss provisions even though he did not suffer a loss of wage earning capacity. Most of the cases on which PEPCO relies involve the second issue. The issue at bar has only come before the federal courts on two occasions, the instant case and *Williams v. Donovan*, 234 F. Supp. 135 (E.D. La. 1964), *aff'd* 367 F.2d 825 (5th Cir. 1966), *cert. denied* 386 U.S. 97 (1967).[7]

In *Bethlehem Steel Co. v. Cardillo*, 229 F.2d 735 (2d Cir. 1956); *Cox v. American Store Equipment Corp.*, 283 F. Supp. 390 (D. Md. 1968); *Gulf Stevedore Corp. v. Hollis*, 298 F. Supp. 426 (S.D. Tex. 1969), *aff'd* 427 F.2d 160 (5th Cir. 1970), *cert. denied* 400 U.S. 831 (1970); and *Traveler's Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), the issue before each court was whether an employee who suffers a permanent injury to an anatomical member listed in a section 8(c) schedule which results in the loss of the member, or a partial loss, but does not result in a loss of earning capacity is entitled to benefits under section 8(c). In each case the employer argued that in order for the employee to recover for his

[7] The *Williams* case is discussed in detail, at 21-23, *infra.*

anatomical loss under section 8(c), he must have incurred a loss of wage earning capacity. In each of those cases the court held that the schedule provide the measure of the recovery. Respondent Cross does not challenge any of those holdings. It is clear that the very purpose of including the scheduled benefit provision was to enable an employee who suffers an anatomical loss to a listed member to receive compensation for that loss even if he did not incur economic loss. Each of those opinions is consistent with the congressional determination that the schedules establish "arbitrarily set healing periods." H.R. Rep. No. 2067, 84th Cong., 2d Sess. 4 (1956).

Similarly, in *Owens v. Traynor*, 274 F. Supp. 770 (D. Md. 1966), *aff'd* 396 F.2d 783 (4th Cir. 1968), *cert. denied* 393 U.S. 962 (1968), the employee suffered a back injury (a non-scheduled loss) and incurred no loss of wage earning capacity. The court held that an anatomical impairment did not equal a disability. If the injury was not scheduled and the loss did not result in a reduction of wage earning capacity, there could be no recovery under section 8(c). At no time did the court consider the issue of whether an employee with both a scheduled loss and lost earning capacity may elect to receive his benefits under section 8(c)(21).

Rupert v. Todd Shipyards, Inc., 239 F.2d 273 (9th Cir. 1956), dealt with whether an employee could collect both benefits for permanent total disability (resulting from head injuries) and permanent partial disability due to a scheduled loss (disfigurement). The court held that permanent partial benefits could not co-exist with an award for permanent total disability. In *Eastern S.S. Lines, Inc., v. Monahan*, 110 F.2d 840 (1st Cir. 1940) the court held that, in light of the employee's economic and personal history, it was not inconsistent to find

the employee both temporarily totally disabled and capable of performing light work. While the injury was to the employee's heel (a potential scheduled loss), the case focused on temporary benefits and gave no indication that section 8(c) or any manner of permanent partial disability benefits were at issue.

The Second Circuit considered a case in which an employee who had suffered the loss of the use of his eye in an earlier non-industrial accident was not entitled to recover benefits under the scheduled loss provisions after he lost that eye in an industrial accident. The court denied him benefits because he had incurred no loss of wage earning capacity. *Iacone v. Cardillo*, 208 F.2d 666 (2d cer. 1953). This opinion appears to be in conflict with the same court's decision in *Bethlehem Steel Co. v. Cardillo*, 229 F.2d 735 (2d Cir. 1956). However, the distinction between these two cases centers on the lack of added impairment in *Iacone, supra*. In any event, the court in *Bethlehem* held that the loss of actual wage earning capacity was irrelevant to eligibility to receive compensation for a scheduled loss.

In *Flamm v. Hughes*, 329 F.2d 370 (2d Cir. 1964), the issue before the court was whether Congress could properly establish schedules of benefits for certain injuries for certain fixed periods and other provisions with indefinite benefits for other injuries. The Court noted:

> Nor is it irrational for Congress to provide a specific schedule of compensation limited to a prescribed number of weeks for enumerated permanent partial disabilities and yet provide compensation for an indefinite period of time for all other injuries leading to permanent partial disability.

Id. at 380. The court was never faced with deciding whether the relief under the scheduled provisions bars section 8(c)(21). Indeed, in *Flamm*, the basic issue surrounded the fact that the employee was originally awarded temporary total disability benefits for a back injury and permanent partial benefits for a foot injury. On reconsideration, the Deputy Commissioner found the employee permanently partially disabled under section 8(c)(21) as a result of a number of non-specified infirmities and not permanently partially disabled as a result of the foot injury. There is no indication that Flamm qualified for a scheduled loss benefit or that he was foreclosed from asserting his right to elect such a benefit. Rather, the court only held that Congress could treat different injuries in different manners.

C. *Williams v. Donovan* Was Incorrectly Decided.

As pointed out above, the only reported cases which have attempted to interpret section 8(c) of the Act with regard to the right of an employee to elect to receive benefits as a result of his economic disability under section 8(c)(21) rather than for his anatomical loss under the scheduled loss provisions are the instant case, *Mason v. Old Dominion Stevedoring Corp., supra; Collins v. Todd Shipyards Corp., supra;* and *Williams v. Donovan*, 234 F. Supp. 135 (E.D. La. 1964), *aff'd* 367 F.2d 825 (5th Cir. 1966), *cert. denied* 386 U.S. 977 (1967). Only *Williams* held that the scheduled benefit provisions bar the right to elect benefits under section 8(c)(21). Yet, the continued viability of the *Williams* decision is doubtful for a number of reasons. First, it appears from the decision that the employee's primary contention was that he was totally disabled and entitled to benefits under

section 8(a) of the Act. That position was rejected because the record clearly supported the Deputy Commissioner's findings that Williams was not totally disabled; indeed there was testimony that he could work as a stevedore, a flagman, a wrench operator, a "hook-on-man" or a forklift driver. (J.A. 56(a)). The question as to the exclusivity of the schedule was only of secondary importance. Moreover, the decision of the District Court was affirmed by the Fifth Circuit in a *per curiam* opinion (367 F.2d 825, J.A. 63(a)-64(a)) which, as pointed out in the opinion below (J.A. 14(a)), did not address the exclusivity issue. It appears that the decision was affirmed on the basis of ". . . whether the award is supported by the record considered as a whole." (J.A. 64(a)). That issue appears to address only the first portion of the district court's opinion in which it found that the record supported the finding that the employee was not totally disabled. (J.A. 54(a)-57(a)).[8]

Furthermore, the decision in *Williams* predated the decision of the District of Columbia Circuit in *American Mutual Insurance Company v. Boston v. Jones, supra,* which firmly established the distinction between economic disability and scheduled benefits. It is in light of that distinction that the Benefits Review Board and the court below have disregarded *Williams* and have found that "economic disability" is an "other case" compensable under section 8(c)(21).

[8]The confusion as to whether the issue as to the exclusivity of the schedule was raised below becomes greater after an examination of the briefs. While the brief of the petitioner (the employee) was not available through the Library of Congress, or this Court, a review of the brief of the Respondent Commissioner indicates that the Petitioner only raised the issue of total disability. Brief of Respondent Commissioner of the Office of Workmen's Compensation at 25-7 (5th Cir., Doc. No. 22, 224).

PEPCO seeks to retrieve the disregarded doctrine of *Williams* by citing to *Jacksonville Shipyards, Inc. v. Dugger*, 587 F.2d 197 (5th Cir. 1979), which distinguished its result from the *Williams* decision. It is critical to note that the decision in *Dugger* involved the question as to whether the scheduled loss provisions barred compensation under the permanent total disability provision. The Fifth Circuit relied on the holding of the District of Columbia Circuit in *Jones, supra*, and distinguished *Williams*. That court did not have before it, nor did it address the issue as to the exclusivity of the scheduled loss provisions to section 8(c)(21).

It is undisputed that Respondent Cross has incurred a significant loss of his wage earning capacity as a result of his knee injury. The Administrative Law Judge found that he incurred a loss of $6,766.92 in earning capacity each year. Using the life expectancy relied upon by PEPCO (Brief of Petitioner at 9), he will lose in wages $203,007.60 over the course of his lifetime. Cross respectfully submits that the record clearly shows that he is a productive workman, who is permanently partially disabled on the basis of his economic loss of wage earning capacity. Even under the award below, Cross will never recover one-third of his lost earning capacity, which will result in a direct economic loss to him of $67,661.80. Certainly Congress did not intend to limit Cross' compensation for a $203,007.60 lifetime loss to $3,191.97. Congress' action of establishing the scheduled loss benefits to compensate an employee for the fact of incurring an anatomical loss was motivated to protect and compensate those employees. It was not Congress' intention nor is it the statute's effect to use that humanitarian schedule to penalize and deprive an employee of compensation for that which he has lost.

CONCLUSION

On the basis of the foregoing, the Respondent Terry M. Cross, Jr., respectfully requests that this Honorable Court affirm the decision below of the United States Court of Appeals for the District of Columbia Circuit and dismiss the writ of certiorari issued to that court.

Respectfully submitted,

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